

State of Missouri
Office of Secretary of State

Case No. AP-08-15

IN THE MATTER OF:

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Respondent.

Serve at
4 World Financial Center
New York, New York 10281

CONSENT ORDER

CONSENT TO JURISDICTION

1. Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) and the Enforcement Section of the Missouri Securities Division (the “Division”) stipulate and agree that the Missouri Commissioner of Securities (the “Commissioner”) has jurisdiction over Respondent and these matters pursuant to the Missouri Securities Act of 2003, Chapter 409, RSMo. *et seq.*
2. Merrill Lynch and the Division stipulate and agree that the Commissioner has authority to enter this Consent Order pursuant to Section 409.6-604(h), RSMo. (Cum. Supp. 2007), which provides:

The commissioner is authorized to issue administrative consent orders in the settlement of any proceeding in the public interest under this act.

WAIVER AND EXCEPTION

3. Merrill Lynch waives its rights to a hearing with respect to this matter.
4. Merrill Lynch waives any right that it may have to seek judicial review or otherwise challenge or contest the terms and conditions of this Order. Merrill Lynch specifically forever releases and holds harmless the Missouri Office of Secretary of State, Secretary of State, Commissioner of Securities and their respective representatives and agents from any and all liability and claims arising out of, pertaining to or relating to this matter.

CONSENT TO COMMISSIONER'S ORDER

5. Merrill Lynch and the Division stipulate and agree to the issuance of this Consent Order without further proceedings in this matter, agreeing to be fully bound by the terms and conditions specified herein.
6. Merrill Lynch consents to the Commissioner's Findings of Fact and Conclusions of Law as set forth below solely for the purpose of this proceeding and any other proceeding that may be brought to enforce the terms of this Consent Order.
7. Merrill Lynch agrees not to take any action or to make or permit to be made any public statement creating the impression that this Order is without a factual basis.

**COMMISSIONER'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

8. Merrill Lynch is a Missouri registered broker-dealer with a home office address at 4 World Financial Center, New York, New York 10281. Merrill Lynch is registered in Missouri through the Central Registration Depository ("CRD") with number 7691.
9. Charles D. Medelberg ("Medelberg") was registered as a securities agent of Merrill Lynch from March 1988, through April 2008. Medelberg worked out of Merrill Lynch's branch office located at 1630 South Lindbergh Blvd., Ladue, Missouri 63131.
10. On or around April 4, 2008, Morgan Stanley & Co. Incorporated ("Morgan") filed a *Uniform Application for Securities Industry Registration or Transfer* ("Form U4") with the CRD to register Medelberg as a securities agent in Missouri. This application revealed, among other things, that Medelberg had a customer complaint while at Merrill Lynch.

Missouri Resident

11. In this complaint a Missouri resident ("MR") alleged that Medelberg failed to follow the customer's instructions regarding the sale of auction rate securities and misrepresented the liquidity of this investment.
12. On April 14, 2008, the Division opened an investigation regarding this customer complaint.
13. During this investigation the Division interviewed and received documents from Medelberg, who stated, among other things, that:
 - a. he spoke to MR in mid-January, 2008, regarding MR's need to liquidate her "seven day auction rate preferred securities [ARS]." ¹ The auction rate securities that MR desired to liquidate were as follows:
 - i. Six (6) shares, Cohen & Steers ("Cohen & Steers") Qlty. M7 Taxable Pfd., Taxable Auction Mkt. Pfd., cusip no. 19247L700 --- \$150,000.00 par value;

- ii. Two (2) shares, Pioneer FI Rate Trust (“Pioneer”), TH7 Taxable Pfd., Taxable Auction Mkt Pfd., cusip no. 72369J409 --- \$50,000.00 par value;
 - b. MR needed this money from her auction rate preferred securities at the end of January to purchase a home;
 - c. Medelberg instructed his sales assistant to “sell the securities so the proceeds would be available at month end;”
 - d. the sell orders were entered on Friday, January 25, 2008, and the six (6) Cohen & Steers preferred shares sold at auction, with proceeds totaling one hundred fifty thousand dollars (\$150,000.00). The two (2) Pioneer preferred shares, totaling fifty thousand dollars (\$50,000.00), did not sell;
 - e. when MR “had the check picked up on Thursday, January 31, 2008, the remaining two shares had not been confirmed as sold yet on the auction. [Merrill Lynch] operations did a ‘credit update’ to advance [MR] the money pending the settlement of the expected auction proceeds the following day, Feb 1, 2008.”
14. An investigation by the Division, and records provided by Merrill Lynch indicated that:
- a. the auctions for MR’s Pioneer preferred shares occurred every week on Thursdays;
 - b. the January 25, 2008, order to sell MR’s Pioneer preferred shares was cancelled and contained the notation: “Early Order – Order should be sent no more than 3 days prior to auction date and no later than 12:15 (NY) on next auction day (01/31/2008);”
 - c. no sell order was timely placed for the sale of MR’s Pioneer preferred shares at the January 31, 2008, auction;
 - d. Medelberg’s sales assistant placed a sell order for the Pioneer preferred shares on Friday, February 8, 2008; however, because that sell order was placed more than three days before the weekly auction on Thursday, February 14, 2008, that sell order was untimely and cancelled;
 - e. Medelberg’s sales assistant placed a sell order for the Pioneer preferred shares a third time on Monday, February 11, 2008; however, that auction scheduled to occur on February 14, 2008, failed and the sale was not executed;
 - f. the weekly auctions for the Pioneer preferred shares have continued to fail, and MR’s Pioneer preferred shares have not liquidated to date.
15. Medelberg stated to Division staff, among other things, that.
- a. he did not receive any notice of the cancellation of MR’s January 25, 2008 order from Merrill Lynch personnel and otherwise was not aware of this cancellation;

- b. operations and management at Merrill Lynch approved the issuance of a certified check to MR in anticipation of the settlement of the sale (on January 31, 2008) of the two Pioneer preferred shares;
 - c. check had been delivered to the person designated by MR;
 - d. he was not aware of the second order entered on February 8, 2008, by his sales assistant or its cancellation;
 - e. he was not aware of the third order entered by his sales assistant on February 11, 2008;
 - f. he first became aware of these orders and the cancellations of these orders on February 13, 2008, when he learned from MR that there was a debit balance in MR's account; and
 - g. he did not receive training from Merrill Lynch regarding the mechanics of the auction rate securities process, including the process for the placement of orders in the auctions.
16. Merrill Lynch claimed, among other things, that:
- a. the order to liquidate MR's ARS was relayed to a sales assistant;
 - b. the sales assistant was to input this order into the system for execution;
 - c. the sales assistant made repeated errors;
 - d. the sales assistant failed to seek assistance from anyone;
 - e. the sales assistant did not advise Medelberg or the manager of the situation; and
 - f. as a result Merrill Lynch was prevented from dealing with a legitimate client issue in a timely manner.
17. Information received by the Division indicated that:
- a. Medelberg's sales assistant was not registered as a securities agent in the State of Missouri;
 - b. Merrill Lynch employed an unregistered sales assistant who entered orders in MR's account without subsequently speaking with Medelberg or MR regarding these orders;
 - c. Merrill Lynch's Missouri registered agent offered and sold auction rate securities to an investor who needed access to her funds to purchase a home at the end of January, 2008;
 - d. Merrill Lynch's agent failed to take advantage of training in the mechanics of selling ARS at an auction;
 - e. Merrill Lynch received a complaint from MR and had discussions with

Medelberg's attorney regarding the failure by the agent to timely enter the MR's order to sell; however, Merrill Lynch did not resolve this situation even though it had access to the information as described above; and

- f. Pursuant to the Division's request, Merrill Lynch paid MR the fifty-thousand dollars (\$50,000.00) for the two preferred shares.

ORDER

WHEREAS, the Commissioner, after consideration of the stipulations set forth above and on the consent of Respondent and the Enforcement Section of the Securities Division, finds the following Order to be in the public interest and necessary for the protection of public investors and consistent with the provisions of Chapter 409, RSMo. (Cum. Supp. 2007).

NOW, THEREFORE, it is hereby Ordered that:

1. Respondent's registration in Missouri is hereby CENSURED;
2. Respondent shall pay MR interest at a rate of eight percent (8%) per annum from the date MR requested that her account be liquidated until MR actually received her funds. This amount shall be paid to the Missouri Investor Restitution Fund within thirty (30) days from the effective date of this Consent Order. The Missouri Investor Restitution Fund shall send this money to MR;
3. Respondent shall pay to the Missouri Secretary of State's Investor Education and Protection Fund the sum of fifteen thousand dollars (\$15,000.00). This amount shall be due and payable within thirty (30) days from the effective date of this Consent Order, and shall be submitted to the Division at 600 W. Main Street, Jefferson City, Missouri 65101;
4. Respondent shall pay to five thousand dollars (\$5,000.00) as the cost of this investigation. This amount shall be payable to the Missouri Secretary of State's Investor Education and Protection Fund. This amount shall be due and payable within thirty (30) days from the effective date of this Consent Order, and shall be submitted to the Securities Division at 600 W. Main Street, Jefferson City, Missouri 65101; and
5. Respondent shall pay its costs and attorney's fees with respect to this matter.

SO ORDERED:

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY, MISSOURI THIS 13TH DAY OF JANUARY, 2009.

ROBIN CARNAHAN
SECRETARY OF STATE

(Signed/Sealed)
MATTHEW D. KITZI

COMMISSIONER OF SECURITIES

Consented to by:

Mary S. Hosmer
Assistant Commissioner of Securities
Missouri Securities Division

Merrill Lynch, Pierce, Fenner & Smith Incorporated

Approved as to Form

David Montague
Attorney for Respondent

¹ See Medelberg letter to Securities Division received on April 24, 2008.